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No. 81- 2096

# In the Supreme Court of the United States

October Term, 1981

JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, and DAVID F. ORTIZ,

Petitioners,

v.

JARTECH, INC., ANATUNA, INC., CINEMA 7, INC., MOOKS, INC., all California corporations, JAMES MITCHELL, ARTIE MITCHELL, and MITCHELL BROTHERS FILM GROUP, a general partnership,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF

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## REPLY BRIEF

Pursuant to U.S. Supreme Court Rule 22.5, Petitioners submit the following Reply Brief to Respondents' "Opposition to Petition for A Writ of Certiorari" in No. 81-2096.

## I

## RESPONDENTS' "LIST OF PARTIES" AND "STATEMENT OF THE CASE" MISSTATES THE TRIAL FACTS.

In their "Opposition to Petition for

A Writ of Certiorari" in each of case nos. 81-2094, 81-2095 and 81-2096, Respondent Corporations Jartech, Inc., Anatuna, Inc., Cinema 7, Inc. and Mooks, Inc. have correctly stated in their "List of Parties" that all four of the California Corporations are "controlled" by James L. Mitchell and Artie J. Mitchell of San Francisco, but have incorrectly stated that the only interest of the Respondent "Mooks, Inc." is as "copyright holder of the motion picture, "C.B. Mamas".

The record shows "Mooks, Inc." first appeared in the lawsuit when added as a party plaintiff in the first amended complaint, pursuant to an amendment which alleged that Mooks, Inc. had received from the Copyright Office a Certificate of Registration of a Claim to Copyright in the motion picture "The Autobiography of a Flea". The record also shows that Respondent Cinema 7, Inc. is not the

copyright holder of the motion picture "The Autobiography of a Flea", as the "List of Parties" states. See the Statement of Facts in the "Petition for A Writ of Certiorari" in No. 81-2094 (Re Judgment on the Verdict (for Defendants) Entered on Dec. 12, 1978 - C.A. 78-3087) at pages 7-8. See also paragraphs 21 through 25 of the First Amended Complaint for Copyright Infringement, filed Oct. 3, 1977, (C.T. 388-407) and C.T. 405-406, showing the Certificate of a Registration of a Claim to Copyright in "The Autobiography of a Flea" in the name of "Mooks, Inc.". The above is not a harmless misstatement of the record as to the Petition in No. 81-2096, as is hereinafter explained.

As is pointed out at page 12 of the "Petition for a Writ of Certiorari" in No. 81-2096 (Re Judgment on Counterclaim In Favor of Counter-Defendants entered Nov.

23, 1979 - C.A. 80-5016), the original complaint for copyright infringement was scheduled for trial on May 24, 1977, seven months after the original complaint was filed. On that date, the three corporations who were plaintiffs in the original complaint which involved three films (Jartech, Inc., Anatuna, Inc. and Cinema 7, Inc.) moved for a dismissal of the complaint pursuant to F.R.C.P. section 41(a)(2). The same was granted by the Court against the Petitioners' objections, but upon condition that the three corporations pay costs to the Petitioners, including an attorney's fee in the amount of $9,778.76. Faced with this conditional judgment, the Respondents changed their position and, instead, moved the trial court for an order to permit the filing of an amended complaint which would reinstate the copyright infringement lawsuit. In their "First Amended Complaint for

Copyright Infringement", filed by order of Court on Oct. 3, 1977 (C.T. 388), the original complaint was expanded. As part of the enlargement, Respondent "Mooks, Inc." was added as a fourth corporate plaintiff and alleged to be the holder of a Registration of A Claim to Copyright in a fourth film "The Autobiography of a Flea" (C.T. 392-393 and 405-406). The "First Amended Complaint for Copyright Infringement", however, failed and neglected to also include "Mooks, Inc." as the holder of a Registration of a Claim to Copyright in a sixth disputed film "C.B. Mamas", which Certificate indicates that Mooks, Inc. had published the film on Mar. 26, 1976, 18 months prior to the filing of the Amended Complaint, (See Plaintiffs' exhibit 6, described in detail at R.T. page 645, lines 3-13).

Thereafter, the Petitioners filed their counterclaim in which they alleged

that a Certificate for Registration of a Claim to Copyright in the disputed motion picture "C.B. Mamas" had also been issued to the new party plaintiff (Mooks, Inc.), and that the federal issues as to "C.B. Mamas" should also be decided under the Plaintiffs' counterclaim.

At page 3 of their "Opposition To Petition For a Writ of Certiorari" in No. 81-2096, Respondents also erroneously state under the heading "Statement of the Case":

> "The defendants counterclaimed, seeking a determination that the motion pictures, including an additional one which had been produced after the lawsuit was filed, were obscene per se, . . ." (our emphasis) 1/

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1/ Petitioners submit that the Respondents' failure to include "Mooks'" copyright claim in the motion picture "C.B. Mamas" in the "First Amended Complaint for Copyright Infringement" can be explained by comparing the photographic content of the time and motion study for "C.B. Mamas" (see Petition for a Writ of Certiorari in 81-2096 at Appendix D-135 through D-155) with the photographic content of the time and motion studies for the five remaining Mitchell Brothers' films. (See Petition for a Writ of Certiorari at Appendix D-1 through D-134 and D-156 through D-

As noted above, the film referred to is "C.B. Mamas" and the Certificate of Registration of a Claim to Copyright on that film had been issued to Mooks, Inc. one year before the Plaintiffs filed their "First Amended Complaint for Copyright Infringement" which added "Mooks, Inc." as the holder of the certificate on "The Autobiography of a Flea". See paragraph 12 of Defendants' Amended Counterclaim (C.T. 518 at line 26, et seq.) and Plaintiffs and Counter-Defendants' Answer to Amended Counter-claim, admitting that fact. (C.T. 539, line 7.)

Although the trial court thereafter issued its order and made the film "C.B.

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185.) "C.B. Mamas" is pure, unadulterated hard-core pornography with no attempt to camouflage the product with a thin story line, as was done in the other 5 films. Respondents' reluctance to include "C.B. Mamas" in the "First Amended Complaint for Copyright Infringement" certainly cannot be attributed to the fact that "C.B. Mamas" "had been produced after the lawsuit was filed", as the above erroneous statement seems to infer, since the copyright claim in "C.B. Mamas" was one year old when the First Amended Complaint was filed.

Mamas" an issue in the lawsuit as to the new party plaintiff "Mooks, Inc." (C.T. 512), it thereafter removed that issue from the jury's determination and reserved it as an issue to be decided by the court. Later, the court decided that such issues did not need to be resolved and dismissed the counterclaim as moot. That dismissal is now before this Court in the Petition for A Writ of Certiorari herein in No. 81-2096 (Judgment re Counterclaim in Favor of Counter-Defendants entered Nov. 23, 1979 - C.A. 80-5016).

The consequence of the trial court's action, dismissing the counterclaim was to permit Mooks, Inc., which had voluntarily appeared as a party plaintiff in the First Amended Complaint, to entertain its action as a plaintiff as to the issues regarding the film "The Autobiography of a Flea", but to deny the defendants the right to adjudicate the same controverted issues as

to "C.B. Mamas".[2/]

The mischief of Respondents' misstatement in its "List of Parties" that the interest of "Mooks, Inc." was limited to that as the copyright holder of the film "C.B. Mamas", and its failure to recite the interest of Mooks, Inc. in the Registration of a Claim to Copyright in the film "The Autobiography of a Flea", is its misleading suggestion that the Counterclaim involving "C.B. Mamas" and Mooks, Inc. bore no relationship to the Plaintiffs in the "First Amended Complaint for Copyright Infringement".

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2/ The trial court's ruling flies in the face of the public policy expressed in F.R.C.P. section 13(a) which requires a defendant to file as a counterclaim "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require the presence of third parties of whom the court cannot acquire jurisdiction".

II

THE DETERMINATION OF WHETHER A WORK IS OBSCENE IS NOT PURELY ONE OF FACT, BUT IS RATHER A MIXED QUESTION OF LAW AND FACT.

Respondents are in error when they claim that "the determination of whether or not a work is obscene is one of fact". (See "Opposition To Petition for a Writ of Certiorari" at page 4.) The determination of obscenity is "a question of fact mixed with a determination of law". Zeitlin v. Arnebergh, 59 Cal.2d 901, 31 Cal.Rptr. 800 at 806, cert. denied in Arnebergh v. Zeitlin, 375 U.S. 957, 11 L.Ed.2d 315, 84 S.Ct. 445; U.S. v. Cutting and Still, 538 F.2d 835 at page 840, footnote 4. As further reply, Petitioners incorporate by reference the discussion on this issue in the Petition for a Writ of Certiorari in No. 81-2094 at Point IB under the heading "(B) THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS' MOTION FOR A DIRECTED VERDICT. THE FIVE MOTION PICTURE FILMS ARE HARD-

CORE PORNOGRAPHY, AND, UNDER ANY STANDARD, ARE OBSCENE AS A MATTER OF LAW. THERE BEING NO GENUINE ISSUE OF FACT AS TO WHICH REASONABLE MINDS WOULD DIFFER REGARDING THE OBSCENITY OF THE FILMS, THE ISSUE IS SOLELY FOR THE DETERMINATION BY THE COURT."

III

RESPONDENTS' CLAIM THAT THE PETITIONERS ARE "A PRIVATE ATTORNEY AND A GROUP OF MEMBERS OF A CITY COUNCIL, ACTING AS PRIVATE CITIZENS", HAS NO SUPPORT IN THE RECORD AND IS AN IMPROPER ARGUMENT.

Respondents' argument at page 4 of their opposition that "there is no statutory or case authority for the proposition that a private attorney and a group of members of a city council, acting as private citizens, may bring suit in a federal district court for the destruction of all prints of a motion picture film" is improper, being an erroneous statement of the trial facts. There is not one shred of evidence that the attorney or members

of the Santa Ana City Council, who were named by the Respondents as defendants in the copyright infringement lawsuit, were acting as a "private attorney" or as "private citizens". The record is clear that such attorney had been employed by the full City Council and that the actions which were taken by the City Council were the actions of the full seven man City Council. See U.S. District Judge Waters' Findings of Fact 2 through 23, appearing at pages 24-29 of the Petition for a Writ of Certiorari in No. 81-2095. The reason that only the attorney and four members of the City Council were named by the Plaintiffs was due to the fact that Plaintiffs filed their federal action immediately after reading the news account in the Santa Ana Register that the attorney employed by the City Council had submitted evidence to the City Council at an executive session at which the four

City Council members herein named were in attendance. At that time, no action was taken by the City Council. The action which subsequently was taken on such evidence was by the full seven member City Council and after due deliberation. See "Petition for Writ of Certiorari" in No. 81-2095 at pages 14-16.

Further, the issue before this Court on the counterclaim is not that which is framed by the Respondents: "Whether a private attorney and a group of members of a city council, acting as private citizens, may bring suit in a federal district court for the destruction of all prints of a motion picture film". The issue is whether the individual members of a City Council when sued as individuals in a copyright infringement lawsuit for money damages to an "alleged" property interest, for actions taken by such defendants on official city business which is clearly

within the scope of their authority and as to which no claim of impropriety is being made, may independently counterclaim and, as counter-plaintiffs, establish the validity of the very issue which was before them in the official city action, which is complained against in the underlying lawsuit; namely, whether or not the motion picture films which were being exhibited were obscene under federal law and not susceptible of a property interest (contraband).

In its opinion on the copyrightability of obscenity, the Court of Appeals held that the obscenity of subject matter may not be raised as a defense to a claim of copyright infringement. (See Petition for a Writ of Certiorari in No. 81-2096 at Appendix A-9.) Petitioners submit that that court's erroneous analysis points up a dilemma which the Court of Appeals full opinion has created. If that analysis is

correct and the obscenity of the subject matter may not be raised by the City Councilmen as a defense in the copyright infringement action, then certainly due process requires that they be accorded the right to assert that issue independently in a declaratory judgment action by way of counterclaim (res judicata and estoppel) and the Court of Appeal's decision is incorrect on the counterclaim issue.

Respondents' argument in their opposition brief (at pages 4-5) that "Petitioners cite the law governing imports (19 U.S.C. section 1305(a), but make no effort to bring themselves within its ambit." is an attempt to cast a red herring across Petitioners' use of that citation. Petitioners' reference to 19 U.S.C. section 1305(a) appears in the Petition at page 57 and specifically refers to this Court's interpretation of 19 U.S.C. section 1305(a) in U.S. v. 37

Photographs, 402 U.S. 363 at 376 that matter which is obscene under federal law is "contraband" and the subject of forfeiture; as a foundation for Petitioners' further argument that "The federal statutes must be read in pari materia". (See Petition at pages 30 and 54). It is clear that Petitioners have asserted no rights under 19 U.S.C. section 1305(a) other than as a foundation for their "in pari materia" claim that the copyright statutes may not be interpreted so as to allow a copyright to obscene subject matter.

The "in pari materia" principle has a further application which is independent of the statutory interpretation which is to be given to the copyright statute in the copyright infringement lawsuit. Here, Petitioners draw an analogy and claim that they may prove, by declaratory judgment as plaintiffs in a counterclaim and as an

estoppel, that, contrary to the claim in the underlying copyright infringement lawsuit, the plaintiffs, under federal law, have no property interest which is susceptible of damage. Although Petitioners do not have "standing" under 19 U.S.C. section 1305(a), they do have the rights as Defendants and Counter-Plaintiffs in the copyright infringement action to establish an "estoppel" under the trial facts herein by a separate counterclaim.

Petitioners submit that the reply herein clearly establishes the need for plenary review of the issues which are framed by the Petitions for a Writ of Certiorari in Nos. 81-2094, 81-2095 and 81-2096.

August 9, 1982

Respectfully submitted

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CERTIFICATE OF SERVICE

I, hereby certify that on this ____ day of August, 1982, the original and 40 copies of the within Reply Brief were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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